

INTER-DEPARTMENT COMMUNICATION

TO	City Council	DATE	September 28, 2006
DEPARTMENT		FROM	Rick Peo
ATTENTION		DEPARTMENT	Chief Asst. City Attorney
COPIES TO	Mayor City Attorney	SUBJECT	Bill No. 06R-190 DSN v. City Consent Decree

In July the City Council authorized this office to enter into a settlement agreement with DSN. This Consent Decree incorporates the settlement terms the Council authorized this office to make. Under the Consent Decree, the Court will order the City to pay DSN \$175,000 in attorney fees and \$55,000 in damages. The Consent Decree will further order the City to allow DSN to occupy its group homes with up to either four or five disabled persons, depending upon the type of dwelling involved, without having to meet the required separation between group homes. Generally, five persons are allowed by right in single-family dwellings, detached. Four persons are permitted by right in multi-family dwelling units and townhouses. Finally, either four or five persons are allowed in each unit of a duplex, depending upon the number of duplexes operated by DSN which are adjacent to each other.

In return, under the Consent Decree, DSN is releasing the City from any and all known claims, demands, causes of action, or liabilities presently held that arise out of or are in any way connected to DSN's (or its predecessor in interest, Active Community Treatment, Inc.'s) request for permits to operate group homes in the zoning jurisdiction of the City of Lincoln. DSN is further releasing and discharging the City from any and all claims that the required separation between group homes violates any statute, regulation, or Constitution of the State of Nebraska or the United States. In addition, DSN is agreeing to dismiss its housing discrimination complaint filed with the U.S. Department of Housing and Urban Development and agreeing to request the U.S. Department of Justice to terminate its investigation of the City of Lincoln's discriminatory housing practices.

In your review of the Consent Decree, you will notice that the State Fire Marshal is not required to pay attorney fees and is only required to pay damages in the amount of \$28,000. There are two primary reasons for this more favorable treatment. First, the State Fire Marshal settled with DSN substantially earlier than the City. Second, DSN's litigation activities primarily involved the City of Lincoln. The City's opposition to DSN's litigation has been time consuming and hard fought. DSN has been required to respond to three partial Motions for Summary Judgment filed by the City. In addition, DSN has filed its own Motion for Summary Judgment. Moreover, since this settlement was reached just prior to the trial date of July 31, 2006, virtually all discovery and preparation of trial documents required in this case by DSN had been completed. Finally, DSN has incurred substantial attorney fees in connection with various

administrative proceedings in this matter (i.e., requests for reasonable accommodation). I believe DSN's attorney fees and costs in this matter are in excess of \$200,000. In addition, prior to retaining Scott Moore, DSN spent approximately \$90,000 in hiring in-house counsel to address the City's failure to grant reasonable accommodations with respect to the properties owned by DSN and ACT. This attorney was discharged shortly after Scott Moore was retained.

Below is a general description of the case, its current status, and a description of risk to the City.

A. DSN; Allegations of Discrimination.

1. **Intentional Discrimination.** The City's required separation between group homes constitutes intentional discrimination against disabled persons as it treats disabled persons different from non-disabled persons. Specifically, it restricts their right to live in the dwelling of their choice and puts a cap on the number of disabled persons who may reside in the City.

2. **As-applied Discrimination.** The City does not enforce the definition of family against four or more unrelated non-disabled persons residing together in a single-family dwelling. Therefore, the definition of family is applied discriminatorily to four or more unrelated disabled persons residing together as their occupancy is treated as a group home subject to separation requirements.

3. **Failure to Grant Reasonable Accommodation.** The City, in August through December in 2003, failed to grant DSN [and its predecessor in interest, ACT] a reasonable accommodation to waive the spacing requirement between group homes in order for DSN to increase the occupancies in its group homes located at Coddington North (August 2003), Coddington South (August 2003), Hunts Drive (August 2003), Lindsey Circle (December 2003), Sequoia Drive (August 2003), SW 18th (December 2003), Timber Ridge (August 2003), South 20th (December 2003) from three disabled persons to four disabled persons. DSN alleges that the failure to grant the requested waiver constitutes discrimination against DSN because DSN had a financial and/or therapeutic necessity for the requested accommodation. DSN further alleges the requested accommodations were reasonable as granting the accommodations would not be a fundamental alteration of the City's Zoning Code or impose an undue financial burden on the City.

B. City Defenses.

1. **Intentional Discrimination.** The separation requirement between group homes does not constitute intentional discrimination for the following reasons:

(i) The Zoning Code provision allowing 4 - 15 disabled persons to reside together in a group home separated from another group home by the 1200 feet or 1/2 mile spacing requirement discriminates in favor of, rather than against, disabled persons. Specifically,

the group home provides an additional housing opportunity for four or more non-related disabled persons to live together which is not available to four or more unrelated, non-disabled persons.

(ii) Even if the separation requirement is discriminatory, it is not unlawful as the City has a rational basis for that discrimination (i.e., to support the deinstitutionalization of disabled persons). In other words, the separation requirement insures that disabled persons are not segregated together in small areas of the City, and furthers the goal of the FHAA, ADA, and Rehabilitation Act that disabled persons be fully integrated into the community.

2. As-Applied Discrimination.

(i) The City does enforce the definition of family on a complaint basis.

(ii) The City engages in education efforts to advise landlords regarding the restriction on the number of unrelated persons who may live together.

3. Reasonable Accommodation. DSN has failed to show that the requested accommodation is necessary.

(i) No Financial Necessity. DSN is financially able to operate its three-person homes without increasing their occupancy from three to four persons.

(ii) No Therapeutic Necessity. Since three-person homes are financially viable, there is no therapeutic necessity to increase the occupancy from three to four persons. Three-person homes are adequately staffed and the residents receive proper therapeutic treatment.

C. Damages and Attorney Fees - \$600,000 - \$700,000.

DSN is requesting the following damages be awarded against the City:

1. Punitive Damages.

2. Actual Damages. Actual damages would include but not be limited to:

(i) Loss of the \$579.00 room and board allowance for an additional person in each group home times the number of months the request was not granted.

(ii) Loss of the \$73.00 extra funding a person would receive for room and board if the group home was classified as a center for the developmentally disabled (four-person home) versus a community-based waiver setting (three-person home). Leon R. Ferdinand, head of the Developmentally Disabled Persons Division of the Nebraska Department of Health & Human Services, testified in his deposition that the rate for room and board in a community-

based waiver setting is \$506.00, whereas the rate in a center for the developmentally disabled is \$579.00. DSN argues that it should be entitled to that \$73 difference for each of the three persons residing in each group home per month times the number of months the accommodation was not granted.

(iii) Loss of service income DSN would have received by having another person in each home, less the expenses incurred to provide additional supervision for that person.

3. Attorney Fees.

4. Costs.

D. Current Status

1. Intentional Discrimination (Separation Requirement). The U.S. District Court has dismissed this claim (subject to appeal) on the basis that the City has a rational basis for the separation requirement.

2. As-Applied Discrimination. The claim is currently set for trial.

3. Failure to Grant Reasonable Accommodation. This claim is currently set for trial. However, the Court has held that since the City did not have a process for granting a reasonable accommodation prior to the adoption of Chapter 1.28 of the Lincoln Municipal Code, DSN's claims for discrimination based upon failure to grant a reasonable accommodation were ripe for adjudication as of June 2004. June 2004 is the date this office advised DSN that the Board of Zoning Appeals did not have the authority to grant DSN's application for a waiver of the spacing requirement. DSN argues the denial occurred in 2003 as DSN had previously been advised that the City did not have an administrative process to grant the accommodation and that therefore DSN needed to petition the City Council to adopt a change of zone to approve DSN's requested accommodation. In other words, the U.S. District Court must decide whether the City's denials of DSN's requests for accommodation were denied in August-December 2003, when the requests were made and not granted; June 2004, when DSN was advised that the BZA did not have jurisdiction to grant the request; or November 2005, when the Council specifically denied the requests for accommodations under Chapter 1.28.

E. Legal Issues.

1. Intentional Discrimination (separation between group homes). The U.S. District Court found that there was considerable support for DSN's claim that the spacing requirement was facially discriminatory, but held that the discrimination was not unlawful as the City has a rational basis for the separation requirement. The U.S. District Court's decision to dismiss this claim of discrimination was based upon Family Style of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8thCir. 1991). In Family Style, the Eighth Circuit Court of Appeals held with respect

to an action brought under the Fair Housing Amendments Act (FHAA) that the rational basis level of scrutiny was to be used in determining whether or not discriminatory conduct was lawful as being necessary to promote a governmental interest. The rational basis test was adopted based upon an earlier U.S. Supreme Court decision (Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)) which held that disabled persons were not a suspect class and thus were only protected against irrational discrimination under the equal protection clause of the Fourteenth Amendment. In Family Style, the Court held that it was rational to believe that a quarter mile spacing requirement would be compatible with the goal of deinstitutionalization of disabled persons as the spacing requirement would in fact require that group homes be integrated in the community rather than in neighborhoods completely made up of group homes that recreate an institutional environment. The decision in Family Style is controlling on the U.S. District Court and thus, the Court was required to find that under the FHAA the City's spacing requirement was permissible under the rational basis test.

However, this ruling does not necessarily mean that the spacing requirement will be sustained on appeal. DSN argues that even if Family Style remains good law regarding claims of discrimination under the FHAA, the rational basis test is not the appropriate standard under Title II of the Americans With Disabilities Act (ADA). DSN argues that in order to justify the spacing requirement, the City must show that its conduct was necessary to promote a compelling governmental interest. The difference between the rational basis and compelling interest test is enormous. Under the rational relationship test, a court must reject a challenge to a facially discriminatory law if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. In addition, it is entirely irrelevant whether the conceived reason for the challenged distinction actually motivated the City. On the other hand, under the compelling governmental interest test, the City must demonstrate that the separation requirement is warranted by unique and specific needs and abilities of the disabled person to whom the separation requirement applies or that the separation requirement actually benefits, rather than discriminates against, the disabled and that the separation requirement is not based upon unsupported stereotypes. A separation requirement has not been upheld by any circuit court of appeals other than by the Eighth Circuit on the rational basis test. Therefore, there is a strong likelihood that the Eighth Circuit Court of Appeals would find the spacing requirement discriminatory under the ADA as the ADA has been held to prohibit more than irrational discrimination under the Fourteenth Amendment equal protection clause. For example, in Alsbrook v. City of Maumelle, 184 F.3d 999, 1009 (8th Cir. 1999), the Eighth Circuit Court of Appeals stated:

Title II does far more than enforce the rational relationship standards recognized by the Supreme Court in Cleburne. Under Title II a state's program, service, or activity, even if rationally related to a legitimate state interest and valid under Cleburne, would be struck down unless it provided 'reasonable modifications'. . . . Only if a state can demonstrate that modifications would 'fundamentally alter' the nature of the service, program, or activity, could a state uphold the state policy.

In Klingler v. Dep't of Revenue, 455 F.3d 888, 896 (8th Cir. 2006), the Eighth Circuit Court of Appeals stated:

We do not think that the rights and remedies that Title II creates are an appropriate means of enforcement of the equal protection rights of disabled people. Title II requires states to take affirmative steps to insure that no qualified individual with a disability shall by reason of such disability be excluded from participation in or be denied the benefits or the services, programs, or activities of a public entity or be subjected to discrimination by any such entity.

The City has argued that even if the ADA prohibits more than irrational discrimination under equal protection clause of the Fourteenth Amendment, those broader prohibitions do not involve facial discrimination but rather are found in the reasonable accommodation clauses. However, the United States District Court for the District of Nebraska has rejected this argument holding that the decision in Alsbrook gave no hint that it distinguished between “straight” discrimination and discrimination resulting from lack of an “accommodation.” Estate of Timothy Lagan v. State of Nebraska, 63 F. Supp. 2d 1025, 1027 (1999).

2. Failure to Grant a Reasonable Accommodation.

(i) Financial Necessity. The major dispute between the City and DSN with respect to financial necessity is how to make that determination. DSN argues that financial necessity should be calculated based solely upon a comparison of the income DSN receives from its clients' room and board in comparison to the expenses DSN incurs to provide that room and board. On the other hand, the City believes that financial necessity should be calculated based upon a comparison of the total income DSN receives from the operation of its homes (i.e., room and board income and service fee income) in comparison to the total expenses DSN incurs for the operation of each of its homes. The evidence provided by DSN generally shows that DSN loses money on room and board. The testimony before the City Council from other providers indicates that they suffer the same problem.

If disabled persons were required to rent their own housing and had the same income and expenses as DSN receives and incurs for room and board, it would be clear that an accommodation would be necessary. Thus, there is a likelihood the Court would find financial necessity in this situation as well. In other words, DSN should not be required to rob Peter to pay Paul (i.e. take money for one thing and use it to pay for another).

(ii) Therapeutic Necessity. In Olmsdead v. Georgia Dep't of Human Resources, 527 U.S. 581 (1999), the United States Supreme Court held that, under Title II of the ADA, states are required to place persons with mental disabilities in community settings rather than in institutions when the state's treatment professionals have determined that community placement is appropriate, that transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities.

DSN alleges that the requested accommodation is therapeutically necessary as to allow DSN to serve the increasing demand for community-based residential treatment for persons with developmental disabilities. Community-based residential treatment allows persons with developmental disabilities, mental illness, and behavioral challenges to gain the skills, knowledge, and experience to increasingly use and benefit from the resources and settings available to all citizens in our community. These persons are best served in a residential setting and the only way to provide this service is for such person to live in a group home.

DSN supports its request for its claim that there is therapeutic necessity based upon the testimony of Rene Ferdinand in his deposition that at the time of his deposition, across the State there were probably 100 to 150 individuals looking for the type of services that are provided by DSN and that the State had funding to pay for those services. DSN also provided testimony before the City Council and in depositions that DSN received referrals and requests to provide services for disabled persons but could not accept them as DSN did not have space in its existing homes.

The City argues that DSN has not shown a therapeutic necessity as there is nothing in the record that suggests a house with four disabled persons (or more) as opposed to a house of three disabled persons is necessary to accommodate the individuals' disabilities. Rather, the evidence shows that DSN and other providers provide a house of three disabled residents with meaningful therapeutic benefits. The City further argues that since a three-person home is financial viable (under the City's view of financial necessity) that likewise a new three-person home could be opened to accommodate those persons presently institutionalized in the State or eligible for services and for which the State has funding.

DSN counters the City's argument by arguing that DSN (and other providers) can't just open up another three-person home. DSN needs disabled persons compatible with each other and having similar needs. In addition, DSN would need to wait until it had three such residents before opening up a new home, whereas adding an additional person to an existing home would occur more readily.

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